

TITLE 18. BOARD OF EQUALIZATION

The State Board of Equalization Proposes to Adopt Amendments to California Code of Regulations, Title 18, Section 1588, *Seeds, Plants and Fertilizer*

NOTICE IS HEREBY GIVEN that the State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation) 1588, *Seeds, Plants and Fertilizer*. Regulation 1588 implements, interprets, and makes specific RTC section 6358's exemption, as pertinent here, from sales and use tax for the gross receipts from the sale and the storage, use, or other consumption of fertilizer applied to land, the products of which are to be used as food for human consumption or are to be sold in the regular course of business. The proposed amendments add language to subdivision (b)(1) of Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food and Agricultural (Food & Ag.) Code section 14513. The proposed amendments revise Regulation 1588, subdivision (b)(2) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The proposed amendments to Regulation 1588, subdivision (b)(1) also add the word "packaged" before the references to "soil amendments" to be consistent with Food & Ag. Code section 14552.

PUBLIC HEARING

The Board will conduct a meeting in Room 121, at 450 N Street, Sacramento, California, on December 17-18, 2014. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board's Website at www.boe.ca.gov at least 10 days in advance of the meeting.

A public hearing regarding the proposed regulatory action will be held at 9:30 a.m. or as soon thereafter as the matter may be heard on December 17 or 18, 2014. At the hearing, any interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1588.

AUTHORITY

RTC section 7051

REFERENCE

RTC section 6358

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Current Law

RTC section 6358, subdivision (d) provides an exemption from sales and use tax for the gross receipts from the sale and the storage, use, or other consumption of fertilizer applied to land, the products of which are to be used as food for human consumption or are to be sold in the regular course of business. For purposes of this exemption, Regulation 1588 defines the term “fertilizer.”

The current provisions of Regulation 1588, subdivision (b)(1) define the term “fertilizer” to include manure, commercial fertilizers, as defined in Food & Ag. Code section 14522, and agricultural minerals, as defined in Food & Agr. Code section 14512. Specifically excluded from the definition of fertilizer in Regulation 1588 are soil amendments, as defined in Food & Ag. Code section 14552, and auxiliary soil and plant substances, as defined in Food & Ag. Code section 14513.

In addition, the current provisions of Regulation 1588, subdivision (b)(2) specifically provide that, as a result of the exemption provided by RTC section 6358, subdivision (d), “[t]ax does not apply to sales of fertilizer to be applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser’s business.” Also, the last sentence in Regulation 1588, subdivision (b) provides that, “[w]hen insecticides are mixed with fertilizer and the mixture sold, that portion of the total price allocable to the fertilizer may be excluded from the measure of the tax if the mixed product is applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser’s business.”

Leaves are able to absorb fertilizer through the pores on their surface. Fertilizer is applied in a foliar application when it is applied directly to leaves (or foliage). Regulation 1588, subdivision (b) has provided that the exemption provided by RTC section 6358, subdivision (d) applies to fertilizer applied in “foliar application” since 1970.

Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1588

Need for Clarification

The Board’s Legal Department has previously determined, as early as 1960, that carbon dioxide is a fertilizer when applied to land in farming. This determination is found in Sales and Use Tax Annotation 510.0580:

Carbon Dioxide. Carbon dioxide sold at retail to farmers for application to their land to assist in the neutralization of alkaline soils, qualifies as a "fertilizer." 5/6/60.

The May 6, 1960, legal ruling, which is summarized in the annotation, explains that in the examined situation, carbon dioxide was sold to farmers for application to land through their irrigation systems, and used to assist in the neutralization of alkaline soils. It also explains that, at the time the legal ruling was written, the Department of Agriculture already considered carbon dioxide sold for such a purpose to be an "agricultural mineral," which is included in the definition of fertilizer for sales and use tax purposes. (Annotations, which are published in the Business Taxes Law Guide, are summaries of conclusions reached in selected legal rulings. See, Reg. 5700, *Annotations*.)

More recently, a question has arisen as to whether carbon dioxide should be classified as fertilizer, when used by a hydroponic farmer. (Hydroponics is a subset of hydroculture and is a method of growing plants using mineral nutrient solutions, in water, without soil.) In the particular case in question, the carbon dioxide is converted to a gaseous form that is delivered to the plants through a perforated tube at or near ground level. The carbon dioxide percolates up and is absorbed by the leaves of the plant (through foliar application) in order to support the life of the plant. Board staff questioned whether carbon dioxide used in hydroponic farming should still be classified as an agricultural mineral, which is included in the definition of fertilizer in Regulation 1588, or whether such use makes the carbon dioxide an auxiliary soil and plant substance, which is specifically not a fertilizer under Regulation 1588. Board staff concluded that carbon dioxide used in hydroponic farming is a fertilizer because the Board had previously concluded that carbon dioxide is a fertilizer when used for the purpose of furnishing an element to be absorbed by the plant itself, thereby becoming a part of the plant's growth, and Regulation 1588 provides for fertilizer to be applied through foliar application. Board staff also concluded that it would be helpful to amend Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and specify that carbon dioxide is not an auxiliary soil and plant substance for sales and use tax purposes.

Interested Parties Process

Business Taxes Committee staff drafted amendments to Regulation 1588, subdivision (b) to clarify the treatment of carbon dioxide and fertilizer used in hydroponic farming. The draft amendments suggested adding language to subdivision (b)(1) of Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513. The draft amendments suggested revising Regulation 1588, subdivision (b) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The draft amendments to Regulation 1588, subdivision (b)(1) also add the word "packaged" before the references to "soil amendments" to be consistent with Food & Ag. Code section 14552.

Business Taxes Committee staff subsequently provided its draft amendments to Regulation 1588 to the interested parties and conducted an interested party meeting on May 21, 2014, to discuss the draft amendments. No formal comments were submitted, however, staff worked with interested parties' suggestions to refine the draft amendments. No further comments or concerns were expressed by interested parties.

September 23, 2014, Business Taxes Committee Meeting

Subsequently, staff prepared Formal Issue Paper 14-005 and distributed it to the Board Members for consideration at the Board's September 23, 2014, Business Taxes Committee meeting. Formal Issue Paper 14-005 recommended that the Board propose to add language to Regulation 1588, subdivision (b)(1) to specify that the term fertilizer includes carbon dioxide and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513. The formal issue paper also recommended that the Board propose to revise Regulation 1588, subdivision (b) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The issue paper also recommended that the Board propose to update the references to "soil amendments" in Regulation 1588, subdivision (b)(1) so that they refer to "packaged" soil amendments to be consistent with Food & Ag. Code section 14552.

Mr. John Gamper, from the California Farm Bureau Federation, appeared during the September 23, 2014, Business Taxes Committee meeting and expressed support for the proposed amendments. Ms. Jeanette Lombardo, from California Food and Agribusiness Advocates, representing Houweling's Tomatoes, appeared along with Mr. Martin Weijters, Senior Corporate Grower, Houweling's Tomatoes, and stated that they were available to answer any question the Members may have.

At the conclusion of the Board's discussion of Formal Issue Paper 14-005 during the September 23, 2014, Business Taxes Committee meeting, the Board Members unanimously voted to propose the amendments to Regulation 1588 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1588 are reasonably necessary to have the effect and accomplish the objective of addressing the issue regarding carbon dioxide used in hydroponic farming (discussed above).

The Board anticipates that the proposed amendments to Regulation 1588 will promote fairness and benefit taxpayers, Board staff, and the Board by clarifying that RTC section 1588 applies to carbon dioxide and fertilizer used in hydroponic farming.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1588 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulation 1588 is the only state regulation implementing, interpreting, and making specific the exemption provided by RTC section 6358, subdivision (d). In addition, the Board has determined that there are no

comparable federal regulations or statutes to Regulation 1588 or the proposed amendments to Regulation 1588.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1588 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

NO COST OR SAVINGS TO STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1588 will result in no direct or indirect cost or savings to any state agency and will result in no cost or savings in federal funding to the State of California. The Board has also determined that the adoption of the proposed amendments to Regulation 1588 result in no direct or indirect cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, and will result in no other non-discretionary cost or savings imposed on local agencies.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1588 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulation 1588 may affect small business.

NO KNOWN COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)

The Board has determined that the proposed amendments to Regulation 1588 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. Therefore, the Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of the proposed amendments to Regulation 1588 will neither create nor

eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California. Furthermore, the Board has determined that the adoption of the proposed amendments to Regulation 1588 will not affect the benefits of Regulation 1588 to the health and welfare of California residents, worker safety, or the state's environment.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

The adoption of the proposed amendments to Regulation 1588 will not have a significant effect on housing costs.

DETERMINATION REGARDING ALTERNATIVES

The Board must determine that no reasonable alternative considered by it or that has been otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

CONTACT PERSONS

Questions regarding the substance of the proposed amendments should be directed to Monica Gonzalez Silva, Tax Counsel III, by telephone at (916) 323-3138, by e-mail at Monica.silva@boe.ca.gov, or by mail at State Board of Equalization, Attn: Monica Gonzalez Silva, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at Richard.Bennion@boe.ca.gov, or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.

WRITTEN COMMENT PERIOD

The written comment period ends at 9:30 a.m. on December 17, 2014, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1588 during the December 17-18, 2014, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1588. The Board will only consider written comments received by that time.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION

The Board has prepared an underscored and strikeout version of the text of Regulation 1588 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1588, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of reasons are also available on the Board's Website at www.boe.ca.gov.

SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1588 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1588, the Board will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at www.boe.ca.gov.